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No. 98-661

In The

Supreme Court of the United States

October Term, 1998

KAILASH C. PANI, M.D. and KAILASH C. PANI, M.D., P.C.,

Petitioners,

vs.

EMPIRE BLUE CROSS BLUE SHIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Are Medicare carriers and intermediaries entitled to official immunity under this Court's holdings in *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580 (1988) and *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997)?

2. Do the Westfall Act or the Medicare Act prohibit official immunity for Medicare Carriers?

3. Does the "discretionary function" exception to the Federal Tort Claims Act ("FTCA") apply to this case?

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STATEMENT OF JURISDICTION

The petition for a writ of certiorari erroneously represents that it is based upon a judgment of the United States Court of Appeals for the Ninth Circuit, when in fact it is the Second Circuit which affirmed the decision of the United States District Court for the Southern District of New York, 93 Civ. 8215 (SHS) (S.D.N.Y. Dec. 20, 1996).

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 1395u(b) provides, in pertinent part

> Contract with carrier under subsection (a) may be entered into without regard to section 3709 of the Revised Statues [41 USCS § 5] or any other provision of law requiring competitive bidding . . .

42 C.F.R. § 421.200 Carrier Functions

> A contract between HCFA and a carrier . . . specifies the functions to be performed by the carrier which must include, but are not necessarily limited to, the following:
>
> > (2) [the] carrier takes appropriate action to reject or adjust the claim if —
> >
> > > (i) Carrier determines that the services furnished were not reasonable, not medically necessary, or not furnished in the most appropriate setting;
> >
> > > (ii) Carrier determines that the claim does not properly reflect the kind and amount of services furnished.

42 C.F.R. § 405.371(b) provides in pertinent part:

> [W]here the intermediary or carrier has reliable evidence that the circumstances giving rise to the need for a suspension of payments involved fraud or willful misrepresentation, . . . the intermediary or carrier may suspend payments without first notifying the provider or other supplier of an intention to suspend payments.

STATEMENT OF THE CASE

A. The Medicare Program

Medicare is a vast national health insurance program that processes and pays the medical claims of tens of millions of elderly and disabled Americans every year. *See United States v. Erika, Inc.*, 456 U.S. 201, 210 n.11, 102 S. Ct. 1650, 1655 n.11 (1982). The Medicare program was established in 1965 under Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 *et seq.* (the "Medicare Act"). The Medicare Act consists mainly of Part A, 42 U.S.C. §§ 1395c-1395i, and Part B, §§ 1395j-1395w. Part A provides major medical insurance coverage for hospital care and related post-hospital service, and is funded out of Social Security taxes. 42 U.S.C. §§ 1395d, 1395i; *see Heckler v. Ringer*, 467 U.S. 51, 104 S. Ct. 2218 (1984). Part B establishes a voluntary program of supplemental medical insurance that provides, in general, for reimbursement of 80 percent of the reasonable cost of certain physician services, outpatient physical therapy, x-ray, laboratory testing and similar medical services. 42 U.S.C. § 1395*l*, 42 C.F.R. § 405.231; *see Erika*, 456 U.S. at 202. Part B is financed through the Federal Supplementary Insurance Trust Fund, which, in turn, is funded by appropriations from the Treasury together with monthly premiums paid by the individuals who voluntarily enroll. *See* 42 U.S.C. §§ 1395r, 1395t, 1395w.

In order to meet the extensive administrative obligations imposed by the Medicare program "with maximum efficiency and convenience for individuals entitled to benefits . . . and for providers of services," Congress authorized the Secretary of the Department of Health and Human Services ("HHS") to enter into contracts with private insurance carriers to administer the claims process. 42 U.S.C. §§ 1395h(a), 1395u(a). These health insurance companies are called "fiscal intermediaries" when they administer Medicare Part A claims, and "carriers" when they administer Part B claims.

Medicare carrier contracts are not conventional Government contracts. Instead, pursuant to Congress' specific legislative scheme, they are unique legal arrangements which are not awarded on the basis of competitive bidding, *see* 42 U.S.C. § 1395u(b)(1); 42 C.F.R. § 421.5(a), which contain automatic renewal clauses for continuation from term to term unless either party gives notice, *see* 42 C.F.R. § 421.5(f), *see also* JA 135 (Part B Contract, Article XXVI), which prohibit the carrier from earning a profit on the contract, and which require the carrier to pass costs directly on to the Government, *see* JA 123 (Part B Contract, Article XV, ¶ A) ("It is the intent of this contract that the Carrier, in performing its functions under this contract, shall be paid its cost of administration under the principle of neither profit nor loss to the Carrier.").

Fraud and abuse occur within the Medicare program every day. "Medicare fraud exacts an enormous toll on the public fisc — estimated losses from fraud and other improper Medicare payments exceed $20 billion a year." *Pani v. Empire Blue Cross and Blue Shield*, 152 F.3d 67, 73 (2d Cir. 1998) (App. A), *citing* Department of Health and Human Services, *CFO Audit Action* 1998 WL 213154 (Apr. 24, 1998). Another important aspect of the distinctive relationship between the Government and Medicare carriers is the Government's heavy reliance on the

carriers to monitor and report potential fraud and abuse. HCFA guidelines[1] require Medicare carriers to alert HHS of possible instances of fraud and abuse, *see, e.g.*, JA 52 (Medicare Part B Carriers Manual 1400 (charging carrier with responsibility to alert HHS of suspected fraud)), and in fact provide fifty-seven pages of instructions concerning the carrier's responsibility to develop programs for detecting and reporting potential fraud and abuse, and to cooperate with the Government in its fraud and abuse investigations. (JA 51-108).

> The carriers and fiscal intermediaries that administer the millions of Medicare claims filed annually are indispensable components of the governmental program and are in a unique position to combat the drain on public resources caused by fraudulent claims.

Pani, 152 F.3d at 73. So great is the Government's need for cooperation by carriers and their employees in its anti-fraud efforts that its contracts with carriers also expressly provide for indemnification to the carriers in the event of a retaliatory suit (JA 122-23) (Medicare Part B Contract Article XIV), and it promises a defense by the United States Attorney's office to carriers' fraud unit employees who may be sued in connection with their work. Carriers Manual at 14006 (JA 64).

B. Previous Litigations Involving Pani

Petitioner Kailash Chandra Pani ("Pani") is one contributor to the illicit drain on Medicare that occurs through fraud and abuse. Pani held a license to practice medicine in New York from 1975 until his license to practice medicine was revoked

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1. As indicated by the Joint Appendix (JA 52), these guidelines are in the public record and available through the Government Printing Office.

on August 30, 1989, as a result of criminal and civil convictions resulting from his submission of false Medicare and Medicaid claims. Respondent Empire Blue Cross and Blue Shield ("Empire") is a not-for profit health insurer licensed to do business under Article 43 of the New York State Insurance Law.[2] Pursuant to contracts with HCFA, Empire is the Medicare Part B carrier and Medicare Part A fiscal intermediary for Westchester County in New York State.

In the course of processing Medicare claims filed by Pani, Empire became aware of the possibility that he was engaging in fraud. As it was obligated to do pursuant to the HCFA guidelines, Empire notified the Government of the suspected fraud. The Government thereupon conducted an investigation of Pani, and brought a criminal action against him in the United States District Court for the Southern District of New York, in which Pani was convicted on May 14, 1984 on four counts of mail fraud (18 U.S.C. §§ 1341-42), three counts of making false claims against the United States (18 U.S.C. § 287) and three counts of conversion of Government funds (18 U.S.C. § 641) in connection with Medicare claims he had submitted to Empire. (JA 145-68). Specifically, the District Court found that Pani had not performed the services for which he had billed and sought reimbursement from Empire. (JA 148-52). Furthermore,

2. As the United States pointed out to the Court of Appeals below (United States *amicus* brief at 31), Empire's not-for-profit status is an additional indicator of the appropriateness of affording it immunity from Pani's suit, as it not only has no contractual incentive, but also no corporate incentive, to minimize the financial losses resulting from Medicare fraud. While petitioners correctly point out that Empire, like many other Blue Cross and Blue Shield plans throughout the country, has taken steps to acquire for-profit status, this does not negate the fact that at the time of Pani's investigation and conviction for Medicare fraud, Empire held not-for-profit status. Nor does it negate the fact that Empire, whatever its corporate form, does not earn a profit on its Medicare operations.

Pani was convicted in New York State Supreme Court on one count of grand larceny in the second degree and three counts of offering a false instrument for filing in the first degree, in connection with claims he submitted to New York State's Medicaid Program (the state criminal action). *People v. Pani*, 138 A.D. 2d 532, 525 N.Y.S. 2d 912 (2d Dept. 1988).[3] Also as a result of Pani's submission of false Medicare claims to Empire, the United States obtained a civil judgment against him on October 31, 1991 in the amount of $32,640 pursuant to the False Claims Act, 31 U.S.C. § 3729. (JA-175).

C. The District Court's Decision

Petitioners filed this action against Empire in 1993 in New York State Supreme Court, alleging three state tort claims: negligence, tortious interference with contractual relations, and breach of contract. *Pani*, 152 F.3d at 70 (App. A at 4a). Virtually ignoring the successful portions of the Government's prior cases against Pani, the complaint alleged that, as to those portions in which the Government had not obtained a conviction or judgment, Empire had mishandled his claims, improperly notified the Government of its suspicions of fraud, improperly failed to pay him for the claims that were under scrutiny, and improperly cooperated with the Government's investigation and development of its cases against him. In short, the complaint sought monetary damages from Empire on the theory that it was not Pani's own proven misconduct, but Empire's cooperation with the Government — precisely the type of conduct the Government requires of its Medicare carriers, *see* 42 C.F.R. §§ 405.371(b), 421.200 — that formed the basis for his ultimate legal and business troubles.

Empire removed the action to the federal court pursuant to 28 U.S.C. § 1441. (JA 7-9). Its initial answer asserted the

3. Empire is not involved in the administration of the Medicaid program.

defenses of failure to state a claim and failure to file within the statute of limitations. On April 18, 1995 the United States filed a motion requesting to be substituted as the proper party defendant, or, alternatively, to be allowed to intervene in the action, and also requesting dismissal of the action for lack of subject matter jurisdiction, for failure to meet the statute of limitations, or alternatively for summary judgment. On the same day, Empire sought leave to file an amended answer asserting the additional defense of official immunity, and also joined the United States' motion for dismissal.

The District Court granted Empire's motion to dismiss by dismissing the complaint with prejudice, and denied the United States' motion as moot. *Pani v. Empire Blue Cross and Blue Shield*, 93 Civ. 8215, 1996 WL 734889 (S.D.N.Y. Dec. 23, 1996) (App. B). The court held that Pani's breach of contract claim lacked subject matter jurisdiction, that his claim for tortious interference with contractual relations lacked the *prima facie* elements of that tort, and that his claim for negligence, as well as his other two claims, were barred on the ground of official immunity. *Id.*, 1996 WL 734889 (App. B at 22a-27a).

D. The Second Circuit's Decision

Pani appealed, claiming that the District Court erred in holding Empire entitled to official immunity.[4] The Second

4. In his appeal, Pani also claimed that it was procedurally improper for the District Court to dismiss the case under Rule 12(b)(6), and that the District Court erred in dismissing the complaint without allowing him leave to amend. In affirming, Second Circuit rejected both arguments. In fact, the court found the dismissal without leave to amend proper for three separate reasons. First, "Pani never requested leave to amend from the District Court, and on appeal he has made no showing that he would be able to amend his complaint in a manner that would survive dismissal." *Pani*, 152 F.3d at 76 (App. A at 16a-17a). Second, (Cont'd)

Circuit affirmed. The court began its analysis of the immunity question by citing almost a dozen federal court decisions that have held that Medicare intermediaries and carriers are immune from state tort suits. *Pani*, 152 F.3d at 72 (App. A at 7a-9a). The court then reviewed the law on official immunity as it has developed under *Westfall v. Erwin*, 484 U.S. 292, 295-297, 108 S. Ct. 580 (1988), which holds that "a federal official is shielded from state-law tort liability for acts that are discretionary in nature and fall within the outer perimeter of the official's duties." *Pani*, 152 F.3d at 72 (App. A at 7a-9a). Noting that this same test applies to nongovernmental entities such as Medicare intermediaries and carriers who are performing work on the Government's behalf, *see Mangold v. Analytic Servs., Inc*, 77 F.3d 1442, 1446-1450 (4th Cir. 1996), the court held that Empire's actions in this case clearly fell within the category of discretionary functions entitled to immunity under *Westfall* since "[t]he investigation and reporting of possible Medicare fraud is precisely the type of delegated discretionary function that the public interest requires to be protected by immunity." *Pani*, 152 F.3d at 73 (App. A at 10a). The court also considered,

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(Cont'd)

"it is virtually certain that Pani's claims would be barred by the statute of limitations." *Id.* at 76 (App. A at 17a). Third,

> [I]t is extremely doubtful that there would be subject matter jurisdiction to consider such a complaint in light of the express limitations Congress placed on judicial review of agency determination of Medicare "Part B" claims filed before 1987.

Id. Pani does not challenge any of these in his petition before this Court. Accordingly, even if this Court were to grant the petition, petitioners' case would nevertheless fail on the dual grounds that he failed to file within the statute of limitations, and that his case fails to provide the court with subject matter jurisdiction.

and rejected, Pani's claim that a contrary result would be mandated under this Court's recent decision in *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997), in that, as distinct from the case before it,

> *Richardson* involved a § 1983 action for constitutional violations; the defendants were employees of a private for-profit company; the conduct at issue was held not to be an essential or traditional government function; and the Court expressly state that its holding was a narrow one and did "not involve a private individual . . . serving as an adjunct to government in an essential government activity."

Pani, 152 F.3d at 73 (App. A at 12a). Here by contrast, a Medicare carrier's functions are defined by an unique statutory scheme under which its actions are, by Congressional design, "indispensable components" of a governmental program of such great "complexity and magnitude" that their delegated role is no less critical to the program's success than that of the Government itself. In these circumstances, the court concluded, Medicare carriers must be allowed to administer the program free of "the costs of vexations and often frivolous damages suits that may arise from such conduct," lest the fear of such suits make them "unduly timid in carrying out their duty to investigate and report suspected fraud." *Pani*, 152 F.3d at 74 (App. A at 13a).

REASONS FOR DENYING THE WRIT

While this case illustrates the extremes to which an individual will go, even after his criminal conviction, to attempt to transfer the blame for his criminal acts away from himself, it presents no "compelling reasons," as required by this Court's Rules, warranting the issuance of a writ of certiorari. The

Second Circuit's holding is clearly correct, and presents no important issue of federal law, for it is merely one of a long line of cases that have appropriately enunciated this Court's holding in *Westfall* that a federal official is immune from state tort claims "for acts that are discretionary in nature and fall within the outer perimeter of [its] duties," *Pani*, 152 F.3d at 72 (App. A at 7a-9a), and that also have appropriately applied that test to non-governmental entities such as Medicare carriers that conduct the Government's business.

Nor is there any reason existing outside the four corners of the Second Circuit's decision mandating review of this case. That decision creates no conflict with any other Court of Appeals; to the contrary, there is virtual unanimity among the federal courts, including as recently as this year, *see, e.g.*, *Midland Psychiatric Ass'n., Inc. v. U.S.*, 145 F.3d 1000 (8th Cir. 1998), that Medicare carriers are entitled to immunity for their work on behalf of Medicare. Nor is there any conflict here with a state court of last resort. Nor, contrary to petitioners' claims, is there any conflict between the Second Circuit's decision below and this Court's recent ruling in *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997), for the Court of Appeals also properly stated and applied the rule of law set down in *Richardson*, to the limited extent of its applicability to the highly distinguishable circumstances here.

In fact, this is precisely the kind of case that should be left to the Courts of Appeals to decide, for it is one among many through which the scope of *Richardson* will be interpreted, distinguished, and/or clarified within the broadly developed *Westfall* line of cases. For this Court to reconsider the issue of official immunity now, before *Richardson's* teachings have had the chance to percolate through the Courts of Appeals, would disserve the historic relationship between the levels of review that underlie the writ's discretionary limitations.

I.

THE COURT OF APPEALS' DECISION IS CORRECT.

This Court's holding in *Westfall* provides that "a federal official is shielded from state-law tort liability for acts that are discretionary in nature and fall within the outer perimeter of the official's duties." *Pani*, 152 F.3d at 72 (App. A at 9a), *citing Westfall*. As the Second Circuit correctly noted, the courts have adopted this same test in determining the scope of official immunity afforded to government contractors charged with state tort violations. *Pani*, 152 F.3d at 72 (App. A at 9a), *citing cases*.

Here, without question, Empire's actions both are "discretionary in nature" and "fall within the outer perimeter" of its duties. As the court noted,

> The investigation and reporting of possible Medicare fraud is precisely the type of delegated discretionary function that the public interest requires to be protect by immunity.

Pani, 152 F.3d at 72 (App. A at 10a). It would be impossible to conclude otherwise, as these duties are specifically required of Medicare carriers in the HCFA Medicare Manual (JA 52). In fact, petitioners do not even argue that the Second Circuit either incorrectly enunciated or misapplied *Westfall* in so concluding.

As importantly, the decision of the Second Circuit accurately reflects the special relationship between Medicare carriers and the Government that Congress envisioned, and thereby advances not only Congress' intent but also the public's significant interest in the Medicare program's effectiveness, efficiency and financial soundness. Indeed, the allegations that lie at the heart of this case are challenges to the best aspects of

that relationship, in which the Government has delegated critical functions such as fraud detection and reporting to the carriers, with the expectation that they use their own initiative to effectuate that important work. Were carriers to be faced with the significant downside of "vexatious litigation" such as this case for taking these kinds of steps, the success of the entire Medicare program's anti-fraud efforts would be seriously undermined.

II.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *RICHARDSON*.

Petitioners' primary goal is to create the false illusion that there is sufficient similarity between this case and *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997), to warrant a second guessing of the Second Circuit's decision to grant immunity to Empire. But the two cases are, as the Second Circuit correctly recognized, so distinguishable on the facts and the law that the result in *Richardson* cannot control here.

Richardson was an action by an inmate under 42 U.S.C. § 1983 against two prison guards employed by a private sector correctional institution for deprivation of his constitutional rights by placing him in extremely tight physical restraints. Recognizing at the outset the special nature of section 1983 as a statute that "creates a species of tort liability that on its face admits of no liabilities," this Court noted that its prior decisions had nevertheless, albeit circumspectly, extended a qualified immunity from section 1983 suits where the

> tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine.

521 U.S. 399, 117 S. Ct. at 2103. Then, analyzing the history surrounding the issue of immunity for privately employed prison guards as it would have appeared to the Congress that enacted section 1983, as well as the purposes behind the immunity doctrine, the Court concluded that neither one furnished the evidence that Congress would have wanted to nullify the protections of section 1983 by extending immunity to such persons.

Contrary to what petitioners would have this Court believe, the Second Circuit did not ignore or misapply this analysis. Rather, the Court of Appeals addressed, and rejected, petitioners' claim that *Richardson* mandates a denial of official immunity to Empire. First, the court below noted, the legal theories underlying this case and *Richardson* are critically different, 153 F.3d at 74. *Richardson* concerned a constitutional claim for the violation of the most basic of individual rights through personal force, 521 U.S. 399, 117 S. Ct. at 2105, whereas petitioners' only alleged causes of action are state tort claims arising out of Empire's denial of payments and its reporting of Pani's suspected fraud to the Government. This Court has taken account of the obvious differences in the weight of these two kinds of interests by finding official immunity to be more limited as against constitutional claims than as against state tort claims. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 747, 102 S. Ct. 2690, 2700 (1982); *Barr v. Mateo*, 360 U.S. 564, 572-576, 79 S. Ct. 1335, 1340-1342 (1959); *Butz v. Economou*, 438 U.S. 478, 508-512, 98 S. Ct. 2894, 2911-2913 (1978) (distinguishing *Barr v. Mateo* by noting that, "[A] quite different question would have been presented had the officer ignored an express statutory or constitutional limitation on his authority"); *Harlow v. Fitzgerald*, 457 U.S. 800, 807-808, 102 S. Ct. 2727, 2732 (1982); *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 1831 (1992) ("[I]rrespective of the common law support, we will not recognize an immunity available at

common law if § 1983's history or purpose counsel against applying it in § 1983 actions."). While *Richardson* represents the more rigorous test applicable to section 1983 claims against private entities employed by a government, *Westfall* provides the test for state tort claims against government contractors.

In addition, the Court of Appeals recognized that there are dispositive factual distinctions between this case and *Richardson*. In *Richardson*, this Court carefully limited its holding to the very specific facts of that case.

> [W]e have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major length administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms.

Id., 521 U.S. 399, 117 S. Ct. at 2108. As the Second Circuit noted, Empire is different from the *Richardson* prison company in almost every one of these respects.

In *Richardson*, the relevant government body, the State of Tennessee, had clearly indicated an intention not to align its interests with the private prison company by barring state sponsored indemnification for such companies regarding civil rights claims. *Id.*, 521 U.S. 399, 117 S. Ct. at 2106-07. Here, the opposite is true. The Medicare Act's legislative history shows that Congress anticipated and intended that the federal Government work hand in hand with Medicare carriers and intermediaries, so much so that it would voluntarily take on the entirety of the legal responsibility for the lawsuits that would arise out of the Medicare program.

> In the performance of their contractual undertakings, the carriers and fiscal intermediaries would act on behalf of the Secretary carrying on for him the governmental administrative responsibilities imposed by the bill. The Secretary, however, would be the real party in interest in the administration of the program, and the Government would be expected to safeguard the interests of his contractual representatives with respect to their actions in the fulfillment of commitments under the contracts and agreements entered into by them with the Secretary.

S. Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 1943, 1992-95, *cited in Bodimetric Health Servs. v. Aetna Life & Cas.*, 903 F.2d 480, 487 (7th Cir. 1990). By virtue of this Congressional design, a Medicare intermediary or carrier so completely stands in the Government's shoes that a number of courts have found it entitled to sovereign immunity in the same manner as the Government itself. *See Pani*, 152 F.3d at 72, *citing cases*; *Bodimetric v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir.), *cert. denied*, 111 S. Ct. 579 (1990) (Congress apparently did not differentiate between the respective abilities of public and private agencies to serve as fiscal intermediaries."). Thus the Second Circuit was justifiably comfortable in its conclusion that, at the very least, a Medicare carrier serves "as an adjunct to [the] government in an essential government activity," warranting official immunity. *Pani*, 152 F.3d at 74, *citing Richardson*, 521 U.S. 399, 117 S. Ct. at 2108.

Furthermore, unlike the prison company in *Richardson* Empire is a not-for-profit corporation which, even if its corporate structure allowed it to do so, is not entitled under its contract with HCFA to make a profit on its Medicare operations. Whereas in *Richardson* the private prison company did not need

the protection afforded by the doctrine of official immunity since "competitive pressure" would provide "strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful or non-arduous employee job performance," *id.*, 117 S. Ct. at 2106-07, Empire neither gains any discernible benefit from aiding the Government in its anti-fraud efforts, nor does it have any financial incentive to accept the costly risks of the kind represented by this suit. Thus, a lack of official immunity for carriers would deter organizations like Empire from entering into carrier contracts with the Government, *see Harlow*, 457 U.S. at 814 (expressing concern about the deterrence of an able citizen from acceptance of public office), and, even where those contracts were entered into, would deter them from working "vigorously" to promote the Government's anti-fraud efforts.

Notwithstanding the Second Circuit's careful parsing of *Richardson*, petitioners claim that it erroneously omitted to conduct the kind of "historical analysis" that petitioners would deem analogous to *Richardson*. Yet far from being an error, the Second Circuit's approach once again reflected the significant legal and factual distinctions between *Richardson* and the case before it. The particular purpose behind *Richardson*'s historical analysis was to determine whether, given that section 1983 was at the heart of the case, there was *at the time of section 1983's enactment* a such a strong "tradition of immunity . . . in the common law" that Congress's silence on the matter should not be taken as an intent to abolish it. *Richardson*, 521 U.S. 399, 117 S. Ct. at 2103. Thus, the *Richardson* analysis was, in effect, an attempt to fill in the legislative history of section 1983.

To look at the history of immunity at the time of section 1983's passage would, needless to say, be an odd procedure in a case such at this where that statute is irrelevant. It would be odder still to look back a century when, as petitioners

themselves point out, the Medicare program which is under review "is fewer than 35 years old." (Petition at 10). Nevertheless, petitioners seem to advocate just such an unusual result. They propose that a court must look back in time, not to the point of Medicare's passage, or to the time when the Government first began to enlist the services of Medicare intermediaries and carriers, or to any other remotely appropriate point, but *to the time before Medicare existed at all*, to determine whether official immunity was afforded to private health insurance companies for tortious acts. The analysis as so structured would accomplish petitioners' self-serving goal, for no history of official immunity would of course exist in an arena during a time before there was any governmental activity there.

A more thoughtful analysis, and the one that the Court of Appeals employed, is to look to the circumstances surrounding the enactment of *the Medicare program*, along with the regulations and case law surrounding it, to determine whether affording immunity to a Medicare carrier for cooperating with Governmental fraud investigations is consistent with the intent of the Medicare law and regulations. Such an analysis leads to a resounding yes. It is clear from the many protections the Government has offered to Medicare carriers and their employees, including indemnification, representation, and substitution as the proper party in lawsuits, that the Government intends to insulate these entities from the negative impact of suits brought in retaliation for their aid to the Government. And the courts have so recognized for at least twenty five years by holding Medicare carriers and intermediaries immune from suit. *See, e.g., Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co.*, 485 F.2d 1073, 1074-75 (D.C. Cir. 1973); *Peterson v. Weinberger*, 508 F.2d 45, 51 (5th Cir.) *cert. denied*, 423 U.S. 830, 96 S. Ct. 50 (1975); *Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55, 57 (5th Cir.), *cert. denied*, 422 U.S. 1043, 95 S.

Ct. 2657 (1975). This has consistently been the state of the law up to the present day. Recent cases continue to afford immunity to Medicare carriers and intermediaries, *see, e.g., Midland Psychiatric Ass'n. v U.S.*, 145 F.3d 1000, 1003-04 (8th Cir. 1998); *Group Health Inc. v. Blue Cross Ass'n*, 739 F. Supp. 921, 932-33 (S.D.N.Y. 1990), as well as those who work for them, *see, e.g., Bushman v. Seiler*, 755 F.2d 653, 655 (8th Cir. 1985).

Finally, while petitioners also fault the Court of Appeals for failing to identify the purposes of the official immunity doctrine to their satisfaction, there is once again no error in that Court's analysis. For the Second Circuit quite clearly articulated the fact that, unlike in *Richardson*, the Government here has an obvious need to obtain full cooperation from its Medicare carriers and intermediaries in its fraud fighting efforts, particularly in the absence of any financial incentives. This need mandates a finding that official immunity be afforded to these entities lest "the threat of liability might appreciably inhibit the fearless, vigorous and effective administration of policies of government." *Barr v. Mateo*, 360 U.S. at 571, 79 S. Ct at 1339.

III.

NEITHER THE WESTFALL ACT NOR THE MEDICARE ACT PRECLUDES OFFICIAL IMMUNITY FOR MEDICARE CARRIERS.

Petitioners next ask this Court to discover a conflict, never before identified by any judicial opinion on this subject, between common law official immunity for Medicare carriers and the legal protections afforded to those carriers under the Westfall Act and the Federal Tort Claims Act. First outlining the significant lengths to which Congress and HCFA have gone

to shield Medicare carriers from suit, including by providing for indemnification and substitution of the United States as the real party in interest in cases involving the Medicare program, petitioners then assert that in affording these protections Congress and HCFA somehow signaled an intent that Medicare carriers not be afforded official immunity.

However disgruntled petitioners may be over the different forms of legal protection afforded Medicare carriers, there is nothing in the Medicare Act, the Westfall Act, their legislative history, any applicable regulations, or any of the cases affording immunity to Medicare carriers which even remotely suggests that official immunity is in "conflict" with these other protections. In fact, Congress' announced intention to indemnify Medicare carriers and to substitute the United States as the real party in interest in these suits indicates just the opposite; namely, that Congress wanted to give Medicare carriers the maximum protection available under the law, and certainly more than typically afforded to other government agents, in exchange for the extensive responsibilities that they were accepting on a no-profit basis.

And while petitioners profess there to be "no need" for the protection of official immunity where such other protections exits, this case itself is an illustration of the fallacy of that statement. For the fact is that, notwithstanding the theoretical possibility that the United States could choose to be substituted as the real party in interest in cases involving the Medicare program, Empire has no control over whether the Government actually does so. In this case, the Government took no action to be so substituted for more than a year after the suit was filed, and though it ultimately did move for substitution the District Court denied its motion as moot at that time. (JA-197). This is not the first case in which such circumstances have arisen. *See Midland Psychiatric Ass'n. Inc. v. U.S.*, 969 F. Supp. 543, 551

(1997), *aff'd*, 145 F.3d 1000 (8th Cir. 1998) (noting that Government's withdrawal of request to be substituted for Medicare carrier precluded application of FTCA). Thus the "extra protection"of the FTCA that petitioners find so redundant and unfair is simply not available to Empire here. Given the reality of this litigation scenario, official immunity does, and should, "remain[] a viable defense for" Empire. *Midland*, 969 F. Supp. at 552.

Finally, despite petitioners' protestations that they will never get their full day in court against the United States if this matter is dismissed, they were free to file this action at the outset against both Empire and the United States but appear to have chosen for strategic reasons (one possibility being the avoidance of the Government's own immunity defense) not to do so. Thus it is without any foundation that petitioners now claim that their avenues for relief have been unfairly cut off by the availability to Empire of official immunity in addition to its other legal protections.

IV.

THERE IS NO CONFLICT BETWEEN THE FTCA AND COMMON LAW IMMUNITY DOCTRINE AS TO THE MEANING OF "DISCRETIONARY" CONDUCT.

In their final attempt to pique this Court's interest in their case, petitioners accuse the Court of Appeals — and all the other courts cited below that have held Medicare carriers and intermediaries entitled to immunity — of failing to recognize yet another imagined confusion in the law. According to petitioner, the common law definition of discretionary acts that has developed under *Westfall* for purposes of the official immunity doctrine is inappropriately broader than the meaning this Court has given to the "discretionary function" exception

set forth in the FTCA, 28 U.S.C. § 2680(a). Therefore, suggest petitioners, this Court's review is necessary to straighten out this inconsistency.

There are three reasons why this claim presents no basis for certiorari review. First, petitioners' claimed conflict is purely theoretical, for there has never been any argument that the FTCA applies to this case. Rather, *Westfall*'s holding, including that portion that relates to the subject of discretionary acts (which petitioners nowhere claim to have been misconstrued by the Court of Appeals), is the test to be used for the official immunity defenses raised by individuals and private entities like Empire that face state-law tort claims arising from their performance of governmental functions. *See Mangold v. Analytic Servs, Inc.*, 77 F.3d 1442, 1446-50 (4th Cir. 1996) (private Government contractor absolutely immune from state-law tort liability under *Westfall* for responding to and cooperating with government investigation). In order to address petitioner's claim, the Court would have to interpret and apply the FTCA to the facts of this case on a purely theoretical basis, which would run contrary to its mandate to decide only those issues of law that are actually presented by the case before it.

Second, even assuming the nonexistent circumstance that the FTCA did apply to this case, there is no conceptual impropriety in giving the FTCA's "discretionary function" test a different scope than that which triggers official immunity. In *Molzof v. United States*, 502 U.S. 301, 310-11, 112 S. Ct. 711, 717 (1992), this Court discussed this very statutory term in order to illuminate its interpretation of another provision of the FTCA. In so doing, the Court forthrightly acknowledged that common law standards had not been incorporated in judicial explications of what is a "discretionary function," and the Court saw no error in this. To the contrary, it was clearly comfortable with the concept that such a term could have different statutory and common law meanings.

Third, even if it were necessary to incorporate the FTCA discretionary function test into the common law official immunity doctrine, Empire's actions in this case would still meet that test. In support of the contrary claim, petitioners assert that under *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1945 (1988), Empire's conduct "could not be found to be discretionary," because the acts of which they complain have not been shown to be part of sufficiently high level policy making decisions to qualify as discretionary. However, in *United States v. Gaubert*, 499 U.S. 315, 325, 111 S. Ct. 1267, 1275 (1991), this Court, in applying *Berkovitz*, rejected just such an interpretation. In that case, the shareholder of an insolvent savings and loan sued the United States, alleging that federal regulators had insufficiently supervised the association's directors and officers. The United States moved to dismiss under the FTCA's discretionary function exception. This Court agreed that the exception barred the claim. Said the Court:

> A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other business, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that govern whether the discretionary function exception applies in a given case."

Id., 499 U.S. at 325, 111 S. Ct. at 1275 (citations omitted). Here, the conduct complained of was to assign procedure codes to Pani's questionable medical procedures and then later to investigate and report the insurance claims that he had submitted

to obtain reimbursement for those procedures, while withholding payments. In line with *Gaubert*, these activities required judgment and decision making on the part of Empire employees. Petitioners do not complain that these actions "were controlled by mandatory statutes or regulations," *Gaubert*, *id.*, 499 U.S. at 330, 111 S. Ct. at 1277. Nor can they deny that "these day-to-day 'operational' decisions were undertaken for policy reasons of primary concern to the regulatory agenc[y]." *Id.*, 499 U.S. at 332, 111 S. Ct at 1278. Consequently, following the analysis of *Gaubert*, Empire would also be entitled to dismissal of this suit under the FTCA's discretionary function exception.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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